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No. 89-33

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1989

RIQUE DON BOBBITT,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Texas Court of Criminal Appeals' retroactive application of *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987), declaring the Texas Speedy Trial Act unconstitutional, a violation of the *Ex Post Facto* Clause?

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IN THE
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RIQUE DON BOBBITT,
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THE STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

The opinion of the First Court of Appeals of Texas filed March 12, 1987 is unpublished, but is reproduced as Appendix A-1 to the Petition for Writ of

[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Bobbitt."

Certiorari. *Bobbitt v. State*, No. 01-86-00549-CR. The unpublished opinion of the Texas Court of Criminal Appeals, issued April 12, 1989, is reproduced as Appendix A-6 to the Petition for Writ of Certiorari. *Bobbitt v. State*, No. 417-87.

JURISDICTION

Bobbitt seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Bobbitt's claim is based on the first amendment to the United States Constitution. Also involved herein are Articles 32A.02 and 28.061 of the Texas Code of Criminal Procedure, attached hereto as Appendix A and B.

STATEMENT OF THE CASE

On October 12, 1985, Bobbitt was arrested in Pasadena, Texas, and charged with public intoxication and possession of cocaine. The public intoxication charge was dismissed by the Pasadena Municipal Court under the Texas Speedy Trial Act, Tex. Code Crim. Proc. Ann. art. 32A.02.

The 185th District Court of Harris County, Texas found Bobbitt guilty of the cocaine possession charge. Punishment was assessed at imprisonment for three years, probated, plus a fine of $1000.

On direct appeal, Bobbitt argued that dismissal of the public intoxication charge required dismissal of the cocaine charge as both arose out of the "same transaction" specified in the enforcement provision of the Texas Speedy Trial Act, Tex. Code Crim. Proc. Ann.

art. 28.061. The First Court of Appeals agreed and reversed Bobbitt's conviction. *Bobbitt v. State*, No. 01-86-00549-CR (Tex.App.--Houston [1st Dist.] March 12, 1987).

The Texas Court of Criminal Appeals granted the State's Motion for Rehearing on Petition for Discretionary Review. On April 12, 1989, the high court reversed the holding of the Court of Appeals and affirmed the trial court's judgment. The court cited its recent decision in *Meshell v. State*, 739 S.W.2d 246 (Tex.Crim.App. 1987) declaring the state's speedy trial act, including Article 28.061, as unconstitutional and, therefore, void *ab initio*. Bobbitt's motion for rehearing was denied on May 10, 1989.

STATEMENT OF FACTS

The facts of the offense are adequately set forth in the opinions of the First Court of Appeals and Texas Court of Criminal Appeals. See Appendix A-1 and A-6 to the petition.

SUMMARY OF ARGUMENT

The Texas Speedy Trial Act, Article 32A.02 of the Texas Code of Criminal Procedure and its enforcement provision, Article 28.061 were procedural statutes designed to assist a defendant in securing his right to a speedy trial. The statute was not intended to nor did it create a right. The Texas Court of Appeals, however, found the statute unconstitutional in violation of the separation of powers doctrine of the Texas Constitution. The state high court held the statute to be invalid *ab initio*.

The court's decision striking down the statute merely changed a mode of procedure and did not alter

any substantial personal rights; hence, its application to Bobbitt's case did not run afoul of the constitutional proscription against *ex post facto* laws. The right to a speedy trial remains untouched and inherent in the federal and state constitutions. Invalidation of the act, therefore, did not leave Bobbitt without any defenses against the elements of the offense charged with, or increase his punishment or aggravate his crime.

Moreover, it is well established that an unconstitutional statute, whether federal or state, is no statute at all. No rights, duties, power or protection exist under it. Bobbitt does not dispute the state statute's unconstitutionality. Instead, he challenges the retroactive invalidity because it strips him of what he characterizes as an available defense to the charges against him. Bobbitt's speedy trial right and its defenses are not and never were vested in the speedy trial act. Rather, they are grounded in the speedy trial clauses of the United States and Texas Constitutions. Consequently, retroactivity does not result in the loss of any rights or defenses.

Additionally, Bobbitt's reliance on prior decisions of the Court of Appeals for the Fifth Circuit addressing retroactive application of judicial decisions is misplaced. The cases are vastly distinguishable from Bobbitt's.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Bobbitt has advanced no special or important reason in this case, and none exists.

II.

RETROACTIVE APPLICATION OF *MESHELL V. STATE*, 739 S.W.2D 246 (TEX.CRIM.APP. 1987) DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE BECAUSE IT DOES NOT PUNISH AS A CRIME AN ACT PREVIOUSLY COMMITTED, WHICH WAS INNOCENT WHEN DONE; DOES NOT MAKE MORE BURDENSOME THE PUNISHMENT FOR A CRIME AFTER ITS COMMISSION, AND DOES NOT DEPRIVE ONE CHARGED WITH A CRIME OF ANY DEFENSE AVAILABLE ACCORDING TO LAW AT THE TIME WHEN THE ACT WAS COMMITTED.

A. Statutory History of the Texas Speedy Trial Act.

The Texas Speedy Trial Act and its enforcement provision became effective July 1, 1978. Tex. Code

Crim. Proc. arts. 32A.01, 32A.02, 28.061 (Vernon 1989). The Texas Court of Criminal Appeals had defined the act as one which provided procedural guidelines for statutory enforcement of a defendant's constitutional right to a speedy trial. *Ordunez v. Bean*, 579 S.W.2d 911 (Tex.Crim.App. 1979). The legislature's authority to enact such guidelines was found in the Texas Constitution:

> The Supreme Court shall have power to make and establish rules of procedure *not inconsistent with the laws of the State* for the government of said court and the other courts of this State to expedite the dispatch of business therein.

Tex. Const. art. V, § 25 (emphasis added) (now repealed by Acts 1985, 69th Legislature, S.J.R. No. 14, § 9, approved November 5, 1985). The state high court determined that for the legislature to enact such procedural rules, a right must exist. "Were it otherwise, the procedural legislation would itself create a substantive 'right,' and exceed the grant of power in Article V, § 25, *supra*, thereby encroaching upon another department." *Meshell v. State*, 739 S.W.2d 246, 255 (Tex.Crim.App. 1987).

In Texas, a defendant's right to a speedy trial is derived from the federal and state constitutions. Tex. Const. art. I, §10; U.S. Const. amend VI; *Hull v. State*, 699 S.W.2d 220, 221 (Tex.Crim.App. 1985); *Turner v. State*, 545 S.W.2d 133, 136 (Tex.Crim.App. 1977).

Later analysis by the state high court of the Speedy Trial Act revealed, however, that the act was not directed at providing procedural guidelines for the speedy *commencement of trial* but rather was directed at speeding the *prosecutor's preparation and ultimate*

readiness for trial. Barfield v. State, 586 S.W.2d 538 (Tex.Crim.App. 1979); *Santibanez v. State*, 717 S.W.2d 326 (Tex.Crim.App. 1986); *Ordunez, supra.* As such, the act was a serious encroachment, without the authority of an express constitutional provision, upon the prosecutor's exclusive function in preparing for trial. *Meshell v. State*, 739 S.W.2d at 256. The court held that in granting a defendant such an overly broad power to control a prosecutor's discretion in preparing for trial, the legislature had exceeded its authority to protect a defendant's speedy trial through procedural legislation. *Id.* at 257. Consequently, the legislature had violated the separation of powers doctrine of the Texas Constitution,[2] and, therefore, both Articles 28.061 and 32A.02 were unconstitutional and void in their entirety. *Id.* at 257, 258. Subsequent cases held that because of its unconstitutionality, the Speedy Trial Act was void *ab initio* and as such it did not justify any act performed under it. *Sanchez v. State*, 751 S.W.2d 514 (Tex.Crim.App. 1988); *Jefferson v. State*, 751 S.W.2d 502 (Tex.Crim.App. 1988).

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[2]Article II,§ 1, supra, provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

B. Because the Speedy Trial Act was procedural in nature, Bobbitt was not deprived of any defenses by the act being declared unconstitutional.

Bobbitt argues that retroactive application of *Meshell*, as was done is his case, is invalid and a violation of *ex post facto* law. This action, he claims, deprives him of the defense of the state's failure to be ready for trial within the time limits prescribed in the act.

Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto law." U. S. Const. art I, § 9, cl. 3, § 10, cl. § 1. Although the prohibition applies to state legislatures, it has been extended, through the due process clause, to action by the judiciary. *Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964).

The Supreme Court first gave consideration to the scope of *ex post facto* prohibition in *Calder v. Bull*, 3 Dall. 386 (1798). For a law to be *ex post facto*, it must be one which:

1) makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; or

2) aggravates a crime, or makes it greater than it was, when committed; or

3) changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; or

4) alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 Dall. 386, 390 (1798); *accord*, *Dobbert v. Florida*, 432 U.S. 282, 292 (1977); quoting *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925); *Miller v. Florida*, ___ U.S.___, 107 S.Ct. 2446 (1987)

No *ex post facto* violation occurs, if a change in law does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance,..." *Miller, supra; Dobbert, supra*; *Beazell v. Ohio*, 269 U.S. at 170-71. Furthermore, if the change does not increase the punishment or change the elements of the offense or the ultimate facts necessary to establish the guilt and is merely procedural, there is no *ex post facto* violation. *Weaver v. Graham*, 450 U.S. 24, 29 n. 12 (1981); *Hopt v. Utah*, 110 U.S. 574, 590 (1884); *Dobbert*, 432 U.S. at 293; *Miller*, ___ U.S. at ___, 107 S.Ct. at 2452-53.

Texas caselaw, cited herein, leaves no question that the Speedy Trial Act was intended to be procedural legislation. Bobbitt himself concedes that "the Act was procedural in form." *See* Petition for Writ of Certiorari at 5. Retroactive application of the unconstitutionality of the Speedy Trial Act left "untouched the nature of the crime and the amount or degree of proof essential to conviction." *Hopt*, 110 U.S. at 590. Furthermore, retroactivity did not attach criminality to any act previously done, which was innocent when done, or aggravate any crime theretofore committed, or provide a greater punishment than was prescribed at the time of its commission. *Hopt*, 110 U.S. at 589.

Since the Act related to modes of procedure only, no vested right under the Act existed. Bobbitt argues that retroactivity deprived him of the right under the act to the defense of prosecutorial delay. That type of defense, however, is not an element of the offense necessary to be proved in order to convict Bobbitt. As such, it is not a defense contemplated by the court in *Calder, Beazell and Dobbert*. All of Bobbitt's speedy trial rights and defenses remained available and protected under the constitutions of the United States and the State of Texas.

III.

THE TEXAS SPEEDY TRIAL ACT WAS VOID FROM ITS INCEPTION BECAUSE AN UNCONSTITUTIONAL CRIMINAL STATUTE IS VOID *AB INITIO* AND CONFERS NO BENEFITS OR RIGHTS, BESTOWS NO POWER ON ANYONE AND JUSTIFIES NO ACT PERFORMED UNDER IT.

A. *No exception to the retroactive application of* Meshell *exists.*

Bobbitt argues that declaring the act unconstitutional *ab initio* deprives him of an available statutory defense on which he relied, thus creating a hardship and imposing an unjust liability. Because of this consequence, Bobbitt maintains that the retroactive application of *Meshell* to his case is invalid.

It is well settled that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law. *Chicago, I & L. R. Co. v. Hackett*, 228 U.S. 559 (1913); *United States v. Realty Co.*, 163 U.S. 427 (1896); *Huntington v.*

Worthern, 120 U.S. 97 (1887); *Norton v. Shelby County*, 118 U.S. 425 (1886). It is wholly void and ineffective for any purpose. *Ex parte Royall*, 117 U.S. 241 (1886); *Ex parte Siebold*, 100 U.S. 371 (1879). Since an unconstitutional law is void, it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. *Norton, supra; Chicago, I & L. R. Co., supra*. Furthermore, where the invalidity of an act goes to the power of the legislature to enact the law, and not merely to the form of the enactment, no rights or correlative obligations may arise under such an invalid statute. *Reyes v. State*, 753 S.W.2d 382 (Tex.Crim.App. 1988). *See also* 16 Am Jur.2d Constitutional Law § 256, 724 (1979).

The general rule, however, is subject to exception:

> It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.

Chicote County Drainage v. Baxter State Bank, 308 U.S. 371, 374-375 (1940).

After declaring the Speedy Trial Act unconstitutional and void, the Texas Court of Criminal Appeals, in accord with prior caselaw and caselaw from other jurisdictions regarding unconstitutional statutes, held the act also was void from its inception and could not provide a basis for any right or relief. *Jefferson v. State*, 751 S.W.2d 502 (Tex.Crim.App. 1988); *Reyes v.*

State, supra. See also 12 Tex.Jur.3d Constitutional Law § 41, 548 (1981).

Holding the Speedy Trial Act unconstitutional *ab initio* may have disposed of Bobbitt's statutory claim, but his constitutional claim remains preserved. His substantial right to a speedy trial has not been altered. Consequently, Bobbitt has not suffered any adverse consequences as a result of the retroactive application of *Meshell*. Due process can be satisfied by deciding Bobbitt's speedy trial questions under the federal and state constitutions.

B. Bobbitt's reliance on Fifth Circuit caselaw is misplaced.

Bobbitt cites *Clay v. Lynaugh*, 846 F.2d 8 (5th Cir. 1988) and *Rubino v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988) to support his contention that retroactive application of *Meshell* is invalid. There are, however, notable distinctions between those cases and *Meshell* which Bobbitt has overlooked or failed to distinguish.

Rubino and *Clay* dealt with Texas' "carving doctrine", a judicially developed rule barring multiple prosecutions and convictions for offenses "carved" out of a single criminal transaction. The doctrine was abandoned in 1982, several years after the commission of the offense in both cases. The Texas Court of Criminal Appeals approved the retroactive application of the elimination of the doctrine in Clay's and Rubino's cases. The Fifth Circuit's concern dealt with the much more apparent, potential consequence of the state high court's action, that of inflicting a greater punishment than the law provided at the time the crime was committed. Both cases were sent back to state court for a determination to that effect.

In Bobbitt's case, demise of the Speedy Trial Act did not, in any devastating method or manner, alter or affect his substantial right, the right to a speedy trial. His right exists intact under the both the United States and Texas Constitutions. Invalidation of the act simply denied Bobbitt a statutory avenue through which to assert his right. It did not foreclose his constitutional one.

CONCLUSION

For these reasons, the state respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

Tex. Code Crim. Proc. art. 32A.01 (Vernon 1989)

Art. 32A.01. Trial priorities

Insofar as is practicable, the trial of a criminal action shall be given preference over trials of civil cases, and the trial of a criminal action against a defendant who is detained in jail pending trial of the action shall be given preference over trials of other criminal actions.

Acts 1977, 65th Leg., p. 1970, ch. 787, § 1, eff. July 1, 1978.

Art. 32A.02. Time limitations

Sec. 1. A court shall grant a motion to set aside an indictment, information, or complaint if the state is not ready for trial within:

(1) 180 days of the commencement of a criminal action if the defendant is accused of a felony;

(2) 90 days of the commencement of a criminal action if the defendant is accused of a misdemeanor punishable by a sentence of imprisonment for more than 180 days; or

(3) 60 days of the commencement of a criminal action if the defendant is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less or punishable by a fine only.

Sec. 2. (a) Except as provided in Subsections (b) and (c) of this section, a criminal action commences for purposes of this article when an indictment, infor-

mation, or complaint against the defendant is filed in court, unless prior to the filing the defendant is either detained in custody or released on bail or personal bond to answer for the same offense or any other offense arising out of the same transaction, in which event the criminal action commences when he is arrested.

(b) If a defendant is to be retried following a mistrial, an order granting a new trial, or an appeal or collateral attack, a criminal action commences for purposes of this article on the date of the mistrial, the order granting a new trial, or the remand.

(c) If an indictment, information, or complaint is dismissed on motion of the defendant, a criminal action commences for the purposes of the article when a new indictment, information, or complaint against the defendant is filed in court, unless the defendant is either detained in custody or released on bail or personal bond to answer for the same offense or any other offense arising out of the same transaction, in which event the criminal action commences when he is detained or released.

Sec. 3. The failure of a defendant to move for discharge under the provisions of this article prior to trial or the entry of a plea of guilty constitutes a waiver of the rights accorded by this article.

Sec. 4. In computing the time by which the state must be ready for trial, the following periods shall be excluded:

(1) a reasonable period of delay resulting from other proceedings involving the defendant, including but not limited to proceedings for the determination of competence to stand trial, hearing on pretrial motions, appeals, and trials of other charges;

(2) any period during which the defendant is incompetent to stand trial;

(3) a period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel, except that a defendant without counsel is deemed not to have consented to a continuance unless the court advised him of his right to a speedy trial and of the effect of his consent;

(4) a period of delay resulting from the absence of the defendant because his location is unknown and:

(A) he is attempting to avoid apprehension or prosecution; or

(B) the state has been unable to determine his location by due diligence;

(5) any period of delay during which the defendant is absent because he is a fugitive or his bail is forfeited or because he resists being returned to the state for trial;

(6) a reasonable period of delay resulting from a continuance granted at the request of the state if the continuance is granted:

(A) because of the unavailability of evidence that is material to the state's case, if the state has exercised due diligence to obtain the evidence and there are reasonable grounds to believe the evidence will be available within a reasonable time; or

(B) to allow the state additional time to prepare its case and the additional time is justified because of the exceptional circumstances of the case;

(7) if the charge is dismissed upon motion of the state or the charge is disposed of by a final judgment and the defendant is later charged with the same offense or another offense arising out of the same transaction, the period of delay from the date of dismissal or the date of the final judgment to the date the time limitation would commence running on the subsequent charge had there been no previous charge;

(8) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, if there is good cause for not granting a severance;

(9) a period of delay resulting from detention of the defendant in another jurisdiction, if the state is aware of the detention and exercises due diligence to obtain his presence for trial;

(10) any period the defendant is released from custody without bail;

(11) any reasonable period of delay caused by exceptional circumstances not under the direct control of the state's attorney, including the completion, by another agency, of scientific analysis necessary to determine the offense to be charged; and

(12) any other reasonable period of delay that is justified by exceptional circumstances.

Acts 1977, 65th Leg., p. 1970, ch. 787, eff. July 1, 1978. Amended by Acts 1979, 66th Leg., p. 4, ch. 3, §1, eff. Sept. 1, 1979; Acts 1987, 70th Leg., ch. 383, § 2, eff. Sept. 1, 1987.

APPENDIX B

Tex. Code Crim. Proc. art. 28.061 (Vernon 1989)

Art. 28.061. Discharge for delay

If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial is sustained, the court shall discharge the defendant. A discharge under this article or Article 32.01 of this code is bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction, other than an offense of a higher grade that the attorney representing the state and prosecuting the offense that was discharged does not have the primary duty to prosecute.

Acts 1977, 65th Leg., p. 1972, ch. 787, § 4, eff. July 1, 1978. Amended by Acts 1987, 70th Leg., ch. 383, § 1, eff. Sept. 1, 1987.

Historical Note

The 1987 amendment rewrote the article which prior thereto read:

"If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial as required by Article 32A.02 is sustained, the court shall discharge the defendant. A discharge under this article is a bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction."

Section 3 of the 1987 amendatory act provides:

"(a) The change in the law made by this Act applies only to the prosecution of an offense committed

on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date."

"(b) The prosecution of an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose."